Filed 4/29/19 P. v. Magana CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. JESUS MAGANA, Defendant and Respondent.	B288123 (Los Angeles County Super. Ct. No. ZM033875)

APPEAL from an order of the Superior Court of Los Angeles County, Robert S. Harrison, Judge. Reversed.

Jackie Lacey, District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys, for Plaintiff and Appellant.

Ricardo Garcia, Public Defender, Albert J. Menaster, Karen Osborne and Lara Kislinger, Deputy Public Defenders, for Defendant and Respondent.

In 2011 Jesus Magana was convicted of two counts of committing lewd and lascivious acts on a child under the age of 14, and was sentenced to six years in state prison. Prior to Magana's release, on November 7, 2016 the People filed a petition to commit Magana as a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA; Welf. & Inst. Code, § 6600 et seq.).[1] The petition was supported by evaluations from two psychologists, Dr. Christopher T. Simonent and Dr. Tiffany Barr, both of whom concluded Magana suffered from pedophilic disorder, was a danger to the health or safety of others, and was likely to engage in future sexually violent criminal behavior. The doctors based their diagnoses in part on a 1994 incident involving an 11-year-old girl and a 2008 incident involving three young children.

At the conclusion of the probable cause hearing, the superior court found there was no probable cause to support the petition. The court found the 1994 incident did not support the diagnoses because there was no evidence the 11-year-old victim was prepubescent. The court also found the reported facts of the 2008 incident involving three young children were "too sketchy" to support the diagnoses because there was no evidence Magana "said or did anything that showed any sexual interest in any of the children."

Although the People concede the 2008 incident does not support the conclusion Magana suffers from pedophilic disorder, they argue the 1994 incident was sufficient because an 11-year-old female victim is properly defined as prepubescent based on her age. Although Dr. Barr opined the onset of puberty varies among individual children, we conclude the trial court erred in dismissing

---

[1] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

the petition for lack of probable cause because "a reasonable person could entertain a strong suspicion that the offender is an SVP" based on the experts' opinions Magana suffered from pedophilic disorder. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252, italics omitted (*Cooley*).)

Magana also contends the trial court improperly admitted the testimony and reports of Drs. Simonent and Barr, asserting they contained inadmissible hearsay describing the 1994 and 2008 incidents. We need not reach whether admission of the testimony and reports was error because Magana forfeited his objection to the testimony by failing to object at the hearing, and any error in admitting the reports was harmless because the descriptions of the incidents in the reports were duplicative of the experts' testimony. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The 1994 Storage Room Incident*[2]

In March 1994 Magana, who was then the manager of an apartment complex, told a tenant she could have a table that was stored in the storage room. Magana, the tenant, and the tenant's 11-year-old daughter went to the storage room to retrieve the table. When the tenant left with the table, Magana asked the daughter to remove a key from a shelf that was above the victim's height. Although the girl did not see a key, she complied and reached up for the key. At that moment, Magana turned off the lights and placed both his hands on her right thigh. Magana then began to move one of his hands up the girl's inner thigh from

---

[2] We describe the 1994 and 2008 incidents based on the descriptions provided in the reports of Drs. Simonent and Barr.

inside her shorts, while the other hand moved up her outer thigh. Neither hand touched the girl's hip or vaginal area. When the girl slapped Magana's hand and told him to stop, Magana complied, apologized, and left the storage room. After hearing about the incident from the girl's sister, the tenant notified the police. Although Magana was initially charged with sexual battery, the crime was later reduced to simple battery, and Magana was sentenced to 24 months of probation.

B. *The 2008 Potato Chip Incident*

On November 11, 2008 a young girl was playing with two young male friends in her apartment courtyard when they were approached by Magana. The arrest record did not reflect the exact age of the children, but Magana told Dr. Simonent that he estimated the girl's age as between four and five years old. Magana asked the children if they wanted some potato chips. When the children answered in the affirmative, Magana put his arm around one of the boy's shoulders and walked with him to the store. However, Magana did not buy potato chips.

When Magana and the boy returned to the apartment complex, Magana gave the boy $1 to buy chips. When the boy's male friend asked Magana for money to buy chips, Magana responded he had money in his apartment. Depending on the witness account, Magana either put his arm across the girl's shoulders, or grabbed her forcefully by the arm and led her across the street to his apartment. A neighbor observed Magana with the girl and informed the girl's mother.

Once inside the apartment, Magana and the girl sat down. Magana then received a telephone call, which he answered. During the call, the girl's mother started banging on the window and yelled out to Magana. After Magana opened the door, the

mother and stepfather took the girl home and called the police. Magana was detained and charged with kidnapping a child under the age of 14. (Pen. Code, § 207, subd. (b).) However, Magana was later released because of insufficient evidence.

C. *The 2011 Apartment Incident*

On October 18, 2011 Magana, then 50, invited his girlfriend and her two children, ages two and five, to his apartment for dinner. After drinking several beers throughout the evening, Magana invited the girlfriend and her children to stay overnight. After the girlfriend and her children fell asleep on a bed in the living room, the girlfriend was awakened by the bed rocking back and forth. When she looked to see what was happening, she discovered Magana was "astride" her five-year-old son, who was still asleep. Magana, who had his right foot on the floor and his left knee on the bed, had pulled the boy's underwear down and was holding the boy's buttocks apart so that his anus was exposed. Magana's penis was exposed, but the mother was unable to see if there was any penetration. When confronted, Magana pulled the boy's underwear back up, and told his girlfriend to go back to sleep.

The girlfriend immediately took her son to the bathroom to examine him. She did not see any "residue" around his anus. When she returned to the living room, Magana was asleep. She fled the apartment with her two children, and called the police. While being examined at the Santa Monica Hospital, the boy told the nurse Magana had earlier entered the bathroom while he was urinating, refused to leave, and touched his penis.

Magana was charged with two counts of lewd or lascivious conduct on a child under the age of 14, and one count of sexual intercourse, sodomy, oral copulation, or penetration of a child

under the age of 10. Pursuant to a negotiated plea agreement, Magana was convicted of two counts of committing lewd and lascivious acts on a child under the age of 14 in violation of Penal Code section 288, subdivision (a). Magana was sentenced to six years in state prison.

D. *Report of Dr. Simonent*

In August 2016 Dr. Simonent interviewed and evaluated Magana. Dr. Simonent also reviewed the May 16, 1994 and November 2008 arrest reports; a December 21, 2011 probation officer's report; a March 9, 2012 abstract of judgment; a February 19, 2016 California Department of Corrections and Rehabilitation SVP screening form; a June 13, 2016 Board of Parole Hearings SVP screening report; a July 7, 2012 mental health placement chronology form; and other criminal and medical records.

Dr. Simonent opined Magana's 2011 offense was a "sexually violent offense." He also concluded Magana suffered from pedophilic disorder. In reaching this conclusion, he noted "clinicians utilize the diagnostic categories of the [American Psychiatric Association's] Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition (DSM-5) to describe the diagnosed mental disorder." According to Dr. Simonent, the DSM-5 uses the following criteria to support a diagnosis of pedophilic disorder: "a. Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger). [¶] b. The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty. [¶] c. The individual is at least 16 years and at least 5 years older than the child or

children in Criterion (a)." Dr. Simonent concluded, using both the Static-99R[3] and Structured Risk Assessment—Forensic Version,[4] that Magana had a high risk of engaging in further sexually violent predatory acts.

E. *Report of Dr. Barr*

On September 9, 2016 Dr. Barr met with Magana, but he declined to be interviewed. Dr. Barr reviewed most of the same records reviewed by Dr. Simonent. Dr. Barr concluded Magana's 2011 offense was a sexually violent offense against a child under the age of 14. She also opined Magana had pedophilic disorder with volitional impairment based on his commission of the 2008 and 2011 offenses after being criminally sanctioned for the 1994 storage room incident. In diagnosing Magana as having pedophilic disorder, Dr. Barr relied on the DSM-5's definition of the disorder and characterization of prepubescence. She noted the DSM-5 "specifies that the diagnosis of Pedophilic Disorder is characterized by recurrent fantasies, urges or behaviors involving sexual activity with a prepubescent child; the DSM-5 goes on to characterize prepubescence as a child 13 years and younger." Dr. Barr used

---

[3] The Static-99R is an updated version of the Static-99. "The 'Static-99' is a sex offender risk assessment tool that must be used to evaluate adult males who are required to register as sex offenders (Pen. Code, § 290.04, subd. (b)(1)), and it is commonly used in SVPA evaluations." (*People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1067, fn. 6.)

[4] The Structured Risk Assessment—Forensic Version selects a reference group in order to place a Static-99R risk score in context. (*People v. Johnson* (2015) 235 Cal.App.4th 80, 86-87.)

both the Static-99R and Static-2002R actuarial instruments[5] to support her conclusion Magana posed a moderate to high risk of committing another sexual offense on a child.

F. *Filing of Petition and Probable Cause Hearing*

On November 7, 2016 the People filed a petition to commit Magana as an SVP upon his release from prison. After several delays, the probable cause hearing commenced on September 19, 2017.

Dr. Barr opined that based upon her review of the records, Magana suffered from pedophilic disorder and was predisposed to the commission of future predatory sexual crimes to a degree that he constituted a menace to the health and safety of others. She further testified that although she previously concluded Magana posed a moderate to high risk of committing another sexual offense, he should have been categorized as posing a high risk.

On cross-examination, defense counsel questioned Dr. Barr about the three incidents involving Magana. Dr. Barr agreed the 2011 incident would not be sufficient alone to support a diagnosis of pedophilic disorder. She acknowledged as to the 1994 incident there was no indication in the record of the 11-year-old girl's sexual development. Dr. Barr testified that sexual "development . . . is dependent on individual characteristics." She agreed the onset of puberty varies in different individuals. When defense counsel inquired, "[Y]ou don't know whether the

---

[5] Like the Static-99R, the Static-2002R assigns a risk score and uses rates and percentiles associated with that score to provide information about the risk of an inmate committing a future sex offense. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 390.)

children . . . in 2008 or 1994, were in fact prepubescent at all; isn't that true?" Dr. Barr responded, "I don't know that for a fact, no." Dr. Barr also acknowledged that during the 1994 incident, Magana did not make any sexual remarks to the victim, did not touch her vagina or breast area, and did not do anything to lure her into the basement. As to the 2008 incident, Dr. Barr testified she had no information on the age of any of the children who were involved or the sexual development of the victim. Instead, Dr. Barr testified as to the girl that "[b]ased on behaviors that the police report mentioned, based on the way that they portrayed the victim, I made inferences about her age."

Dr. Simonent also opined Magana suffered from pedophilic disorder. Further, Magana was likely to engage in further sexual violent predatory behavior absent appropriate treatment and custody. Dr. Simonent concluded Magana was a high-risk offender.

On cross-examination, Dr. Simonent agreed that a single sexual offense against a child would not be sufficient to support a diagnosis of pedophilic disorder. As to the 1994 incident, Dr. Simonent acknowledged Magana did not make any sexual statements to the girl and did not touch her vagina. But he considered Magana's touching of the girl to be sexual because his hand was headed toward her vagina. Dr. Simonent believed Magana had lured the girl into the storage room, although she voluntarily stayed after her mother left. As to the 2008 incident, Dr. Simonent assumed based on the facts in the police report that Magana had a sexual intent. But he acknowledged Magana did not make any sexual statements or exhibit sexual behavior toward the young girl. Neither was there evidence Magana touched the girl while in his apartment.

At the conclusion of the testimony, the People moved their exhibits into evidence, including the reports of Drs. Barr and Simonent. Magana objected to the reports on the basis they "contain multiple levels of hearsay." Magana's counsel added, "I think that it's the court's duty to take the witness's testimony that has been elicited in court and evaluate the case based upon that. [¶] If the court is inclined to admit the evaluations themselves, I would submit that we need to redact them as to the hearsay information that's contained therein and that has not been testified to or there has not been an exception established." The prosecutor responded that under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) he did not "have any objection to those portions being redacted . . . . But the rest of the evaluation is admissible under [section] 6600 . . . ."[6] After Magana's attorney noted that section 6600 only applied to proof of qualifying sexual offenses, not an expert's evaluation of whether a person is an SVP, the prosecutor responded, "There's no real hearsay because both witnesses testified."

The court stated in response to the attorneys' arguments, "I'm inclined to admit the evaluation, but . . . the court will disregard the hearsay evidence in the report and focus on just the qualifying offense description and admissible document qualifying offense and, of course, the evaluator[']s ultimate evaluation. . . . [¶] . . . [¶] . . . I certainly won't accept [the hearsay in the reports]

---

[6] Section 6600, subdivision (a)(3), provides that "[t]he details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals."

for purposes of establishing underlying facts[,] only for understanding their analysis."

G. *The Superior Court's Probable Cause Ruling*

On December 26, 2017 the superior court found the People had not met their burden to show probable cause to believe Magana qualified as an SVP. In its December 29, 2017 written clarification, the court explained "that both evaluators' conclusions that Mr. Magana suffered from a diagnosable mental disorder (which would predispose him to commit sexually violent predatory crimes) were inherently unsound as they hinged upon unwarranted assumptions without basis in science or fact."

The superior court concluded the 1994 incident "cannot support the evaluators' conclusion as there is no information upon which they can properly assume that the eleven-year old girl involved was prepubescent. The records of the incident only disclose her chronological age. . . . The girl could just as easily been physically mature or pubescent, which together are statistically more likely than that she was prepubescent at the age of eleven. To premise a diagnosis of a mental disorder on complete speculation, as the doctors did here, renders their opinions unreliable and insufficient evidence that Mr. Magana suffered from a diagnosable mental disorder."

The court found as to the 2008 incident, "Significantly, no-one reported that Mr. Magana said or did anything that showed any sexual interest in any of the children. To furnish his actions with a sexual motivation is, again, mere supposition."

The superior court concluded that without the 1994 and 2008 incidents, "the evaluators would be unable to premise their opinion of a diagnosable mental disorder solely on the 2011 crimes for which he was convicted."

The People timely appealed.[7]

DISCUSSION

A. *The SVPA*

"The SVPA authorizes the involuntary civil commitment of a person who has completed a prison term but is found to be a[n] [SVP]." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 344 (*State Dept. of State Hospitals*).) An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health or safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

"'[A] petition to request commitment . . . shall only be filed if [two] independent professionals . . . concur that the person meets the criteria for commitment . . . .' (§ 6601, subd. (f).) . . . [Citation.] . . . [Citation.] The court thereafter 'shall review the petition and shall determine whether there is probable cause to believe that the individual . . . is likely to engage in sexually violent predatory criminal behavior upon his or her release.' (§ 6602, subd. (a).) The court must order a trial if there is probable cause, and it must dismiss the petition if there is not. (*Ibid.*)" (*State Dept. of State Hospitals, supra*, 61 Cal.4th at pp. 345-346; accord, *People v. Superior Court* (*Vasquez*) (2018) 27 Cal.App.5th 36, 43.)

At the probable cause hearing, the People have the burden to show that an offender is currently an SVP by establishing the

---

[7] The superior court stayed the order until February 16, 2018 to provide the People time to seek appellate review.

alleged offender has been convicted of a qualifying sexually violent offense against one or more victims. (§ 6600, subd. (a)(1); *State Dept. of State Hospitals, supra*, 61 Cal.4th at p. 344.) In addition, the People must show "the offender has a diagnosable mental disorder; . . . the disorder makes it likely he or she will engage in sexually violent criminal conduct if released; and . . . this sexually violent criminal conduct will be predatory in nature." (*Cooley, supra*, 29 Cal.4th at p. 236; accord, *People v. Poulsom* (2013) 213 Cal.App.4th 501, 519 [same].)[8] The court's determination "entails a decision whether a reasonable person could entertain a strong suspicion that the offender is an SVP." (*Cooley*, at p. 252, italics omitted.) In making that decision, "the superior court may evaluate the validity of any evidence presented by an expert, as well as judge the credibility of any expert witness who testifies at the hearing." (*Id*. at p. 257.)

However, "[t]he superior court should not find an absence of probable cause simply because it finds the defense witnesses slightly more persuasive than the prosecution witnesses. Rather, to reject the prosecution evidence at the probable cause stage, either the evidence presented must be inherently implausible, the witnesses must be conclusively impeached, or the demeanor of the witnesses must be so poor that no reasonable person would find them credible. Thus, if the prosecution presents evidence a reasonable person could accept over that presented by the defense, probable cause should be found. The superior court may not substitute its own personal belief as to the ultimate determination

---

[8] At the time of the offense at issue in *Cooley*, former section 6600, subdivision (a)(1), required that the qualifying sexually violent offense be committed against two or more victims. (*Cooley*, *supra*, 29 Cal.4th at p. 236.)

to be made at trial for that of a reasonable person evaluating the evidence." (*Cooley, supra*, 29 Cal.4th at pp. 257-258.)

B. *Standard of Review*

"[A] section 6602 hearing is analogous to a preliminary hearing in a criminal case; both serve to ""weed out groundless or unsupported charges . . . and to relieve the accused of the degradation and expense of a . . . trial."""" (*Cooley, supra*, 29 Cal.4th at p. 247; accord, *People v. Poulsom, supra*, 213 Cal.App.4th at p. 520 ["Courts typically treat a probable cause hearing under the [SVPA] like a preliminary hearing in criminal cases."].)

The standard of review applicable to preliminary hearings in criminal cases therefore applies to probable cause determinations in SVP cases. (*Cooley, supra*, 29 Cal.4th at p. 257; see *People v. Carlin* (2007) 150 Cal.App.4th 322, 333 [in reviewing jury's finding that inmate was SVP, "'courts apply the same test as for reviewing the sufficiency of the evidence to support a criminal conviction"'].) "[W]hen reviewing a probable cause determination made pursuant to [the SVPA], '[t]he character of judicial review . . . depends on whether the [superior court] has exercised [its] power to render findings of fact. If [it] has made findings, those findings are conclusive if supported by substantial evidence. [Citations.] If [it] has not rendered findings, however, the reviewing court cannot assume that [it] has resolved factual disputes or passed upon the credibility of witnesses. A dismissal unsupported by findings therefore receives the independent scrutiny appropriate for review of questions of law.'" (*Cooley, supra*, 29 Cal.4th at p. 257; see *People v. Slaughter* (1984) 35 Cal.3d 629, 638 [in reviewing magistrate's dismissal at preliminary hearing, "[a] dismissal unsupported by findings . . . receives the independent scrutiny

appropriate for review of questions of law"]; *People v. Rowe* (2014) 225 Cal.App.4th 310, 317 ["'We review the magistrate's legal conclusions [at the preliminary hearing] de novo, but are bound by any factual findings the magistrate made if they are supported by substantial evidence.'"].)

In this case, there were no disputed questions of fact, and the superior court found there was no probable cause to support the petition based on the 1994 incident as a matter of law. Accordingly, we independently review the superior court's order finding no probable cause.

C. *The People Met Their Burden of Proof To Show a Strong Suspicion Magana Was an SVP Based on the 1994 Incident*

Because the People concede the 2008 potato chip incident was not sufficient to support the doctors' diagnoses of pedophilic disorder, we focus on the 1994 storage room incident and the superior court's conclusion there was insufficient evidence the 11-year-old girl involved in the incident was prepubescent. In diagnosing Magana with pedophilic disorder, both Drs. Barr and Simonent relied on the DSM-5's definition of pedophilic disorder and description of a prepubescent child as one "generally age 13 years or younger."[9]

---

[9] Merriam Webster's Collegiate Dictionary defines "pubescent" as "arriving at or having reached puberty," and "puberty" as "the condition of being or the period of becoming first capable of reproducing sexually marked by maturing of the genital organs, development of secondary sex characteristics, and in the human and in higher primates by the first occurrence of menstruation in the female." (Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 1005, col. 2; accord, *In re Randy S.* (1999) 76 Cal.App.4th 400, 405, fn. 5 [relying on Webster's dictionary definition of pubescent].)

Magana contends the experts' conclusion the 11-year-old girl in the 1994 incident was prepubescent lacked foundation because there was no evidence in the record of her sexual development, relying on *People v. Wright* (2016) 4 Cal.App.5th 537, 545 (*Wright*). Magana points to Dr. Barr's testimony that sexual "development . . . is dependent on individual characteristics," and the onset of puberty varies among individuals.

The holding in *Wright* is distinguishable. There, the superior court based its finding John Wright was an SVP on a psychologist's diagnosis of hebephilia, which the expert described as a sexual interest in pubescent children who were in the "'in-between area from pre-pubescent to post-pubescent.'" (*Wright, supra*, 4 Cal.App.5th at p. 541.) The expert acknowledged hebephilia was a "'rare' diagnosis" and "[s]o controversial . . . that it was deliberately excluded from the [DSM-5]." (*Ibid.*) The expert also conceded there was no information in the record as to the sexual development of the victims, but he based his opinion on his assumption the 14- and 15-year-old victims lacked full sexual development. (*Id.* at p. 542.) The second psychologist concluded Wright was not an SVP because there was insufficient information the victims were "in the middle of their pubescence." (*Id.* at p. 544.) The Court of Appeal reversed the superior court's finding Wright was an SVP, explaining, "'[A]n expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence.'" (*Id.* at p. 545; see *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 ["'the matter relied on must provide a reasonable basis for the particular opinion offered, and . . . an expert opinion based on speculation or conjecture is inadmissible'"].)

In contrast to *Wright*, both Drs. Barr and Simonent relied on the description of a prepubescent girl in the DSM-5. As Dr. Simonent explained, "[C]linicians utilize the diagnostic categories of the [DSM-5] to describe the diagnosed mental disorder." The Supreme Court has similarly described a prior version of the DSM as "the then accepted diagnostic tool in the mental health profession." (*People v. Weaver* (2001) 26 Cal.4th 876, 938, fn. 13; see *People v. Elmore* (2014) 59 Cal.4th 121, 136, fn. 7 [relying on DSM-5 for definition of delusion].)

Moreover, the court in *Wright* reviewed the evidence under section 6604, which "'requires that a court or jury find "beyond a reasonable doubt, the person is a sexually violent predator."'" (*Wright, supra*, 4 Cal.App.5th at p. 544, quoting *Cooley, supra*, 29 Cal.4th at p. 246.) But at the probable cause hearing, the trial court was required to determine whether "a reasonable person could entertain a strong suspicion that the offender is an SVP." (*Cooley*, at p. 252, italics omitted.) Further, as the *Cooley* court explained, "[T]o reject the prosecution evidence at the probable cause stage, either the evidence presented must be inherently implausible, the witnesses must be conclusively impeached, or the demeanor of the witnesses must be so poor that no reasonable person would find them credible." (*Id*. at p. 258.)

The experts' reliance on the description in the DSM-5 of a prepubescent girl was not "inherently implausible," nor were the experts "conclusively impeached" by their concession they did not know the details of the 11-year-old victim's sexual development. (*Cooley, supra*, 29 Cal.4th at p. 258.) The trial court erred

therefore in rejecting the experts' opinions at the probable cause stage of the proceedings.[10]

D. *Magana Forfeited His Challenge to the Experts' Testimony, and Even if Admission of the Experts' Reports Was Error, It Was Harmless*

Magana contends the testimony and reports of Drs. Barr and Simonent contained inadmissible hearsay under *Sanchez, supra*, 63 Cal.4th 665, because the experts relied on Magana's arrest reports describing the 1994 and 2008 incidents. We need not reach whether admission of the testimony and reports was error because Magana has forfeited his objection to the testimony by failing to object at the hearing, and any error in admitting the reports was harmless because the descriptions of the incidents in the reports were duplicative of the experts' testimony.

The Supreme Court in *Sanchez* held an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.) As the court explained, if the expert testifies to these "out-of-court statements to explain the bases for his [or her] opinion," the statements are necessarily considered by the jury for their truth, and are hearsay. (*Id.* at p. 684.) However, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he [or she] did so" without violating either the hearsay rules or the confrontation clause. (*Id.* at p. 685.) As the courts have found, "[t]he *Sanchez* rule applies to

---

[10] We need not reach whether additional evidence or studies will be necessary at trial to support the expert's testimony the 11-year-old victim was prepubescent.

civil SVP proceedings." (*People v. Bocklett* (2018) 22 Cal.App.5th 879, 890 (*Bocklett*) [applying *Sanchez* to SVP jury trial adjudicating defendant an SVP]; accord, *People v. Roa* (2017) 11 Cal.App.5th 428, 448-449 (*Roa*); *People v. Burroughs* (2016) 6 Cal.App.5th 378, 403 (*Burroughs*).)

As the parties acknowledge, no court has addressed specifically whether *Sanchez* applies to a probable cause hearing because *Bocklett*, *Roa*, and *Burroughs* were decided in the context of an SVP trial. We need not reach whether *Sanchez* bars the testimony here because Magana failed to object to the experts' testimony, himself repeatedly questioning Drs. Barr and Simonent about the 1994 and 2008 incidents by referring to the police reports, even quoting the statement in Dr. Simonent's report that in 1994 Magana "sexually assaulted an 11-year-old female victim by luring her into a basement." Indeed, Magana's attorney urged the court to exclude the expert reports as hearsay and instead "take the witness's testimony that has been elicited in court and evaluate the case based upon that." Thus, Magana has forfeited any objection to admission of the experts' testimony, including their testimony as to the details of the 1994 and 2008 incidents. (*People v. Abel* (2012) 53 Cal.4th 891, 924 ["A defendant who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error"]; *People v. Jennings* (2010) 50 Cal.4th 616, 654 [failure to make hearsay objection to statement at trial forfeited claim on appeal].)

Further, because Magana's attorney elicited from the experts all the details of the incidents prior to objecting to admission of the experts' reports, any error in admitting the expert reports was harmless because it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956)

46 Cal.2d 818, 836; accord, *Bocklett*, *supra*, 22 Cal.App.5th at p. 890 ["even if the trial court erroneously admitted the police reports, the assumed error was harmless based on the expert testimony that relayed substantially all the conduct stated in the police reports"].)[11]

DISPOSITION

The order is reversed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

---

[11] We do not apply the heightened standard of harmless error beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, because the confrontation clause does not apply to SVP civil commitment proceedings. (*People v. Otto* (2001) 26 Cal.4th 200, 214 [confrontation clause did not apply to admission of victims' hearsay statements in SVP proceeding because "[t]here is no right to confrontation under the state and federal confrontation clause in civil proceedings"].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.